United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Orig w/ affidavit of mailing

76-1378

To be argued by
RICHARD APPLEBY

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

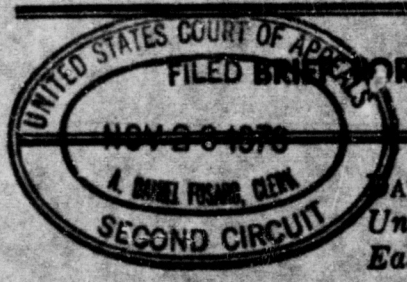
Docket No. 76-1378

UNITED STATES OF AMERICA,
Appellee,

—against—

JACINTO NEGRON,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



FILED BRIEF FOR APPELLEE

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RICHARD APPLEBY,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Mark A. Costantino, *J.*) entered on March 18, 1976, denying appellant Jacinto Negron's motion under Rule 35 of the Federal Rules of Criminal Procedure to vacate as illegally imposed a sentence of 10 years imprisonment and a 15 year special parole term, with the special condition that Negron be deported to Colombia, South America, upon completion of the jail sentence. The above sentence was imposed after Negron pleaded guilty to the charge of distributing approximately a kilogram of cocaine, in violation of Title 21, United States Code, Section 841(a)(1).

Statement of Facts

Appellant Jacinto Negron, together with Maria Nunez, Ramon Restrepo, Enrique Lozano, Luis Toro and a Jane Doe were charged in a three count indictment with conspiracy to distribute (Count One), possession with intent to distribute (Count Two), and the actual distribution (Count Three) of large quantities of cocaine, in violation of Title 21, United States Code, Sections 841(a)(1) and 846. On September 3, 1975, after a proper factual basis was established and after appellant indicated his plea was voluntarily made with full knowledge of its consequences, the court accepted appellant's plea of guilty to Count Three of the indictment (Tr. Sept. 3, 1975, 12).[1] In view of appellant's assertion that he was 23 years old, the judge advised him of the possibility of his being sentenced under the Youth Corrections Act (Title 18, United States Code, Section 5005 *et seq.*) and also explained to him the ramifications of Youth Corrections Act treatment (Tr. Sept. 3, 1975, 13).

On October 24, 1975, appellant appeared before the court for sentencing. At the outset, appellant's retained attorney, Jeffrey Ressler, acknowledged appellant's prior New York State conviction in 1972 for assault (Tr. Oct. 24, 1975, 6). Counsel then attempted to portray his client as a "carrier for the principals" in the cocaine conspiracy. The judge at first expressed some skepticism towards this statement, but then agreed to accept it as true (Tr. Oct. 24, 1975, 6).

After counsel had concluded his remarks, the judge asked appellant whether he wished to address the court, and the following colloquy occurred (Tr. Oct. 24, 1975, 7-8):

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[1] Numerals in parenthesis preceded by a date refer to pages of the transcript of the proceedings on that date.

The Court: Mr. Negron, you have a right to speak. You may say anything you desire on your behalf before I pass sentence. The Court has a probation report at this time.

The Defendant: The only thing I want to do is to release the innocent ones and since we are guilty we might as well do whatever the Court desires.

The Court: All right, then the Court is ready to pass judgment on the defendant. Do either one of you have anything else to say, does the defendant have anything more to say?

The Defendant: Ask him whether I could, could go back to the street or could I go back, could I be released on bail?

The Court: If he should think he's entitled to probation, let the Court know why you think you're entitled to Probation. (No response.)

The Court: Nothing further to say?

The Defendant: No.

The Court: The Court passes judgment as follows: taking into consideration the attorney's statement and the defendant's statement to the Court, I sentence the defendant to ten years in jail, fifteen years special parole term. The condition being after he completes his jail term, he is to be deported, not to return to America.

Upon being advised by the prosecutor that appellant claimed to be 23 years old, the court stated that it was not imposing a sentence under the Youth Corrections Act, saying: "The Court must now advise him in view of his involvement in the matter before the Court and

the particular part that he took in that involvement, the Court denies him Y.C.A. treatment. (Tr. Oct. 24, 1975, 8-8a).[2]

ARGUMENT

There is no basis for appellant's claim that his sentence was illegally imposed by the Court.

Appellant claims that his sentence was illegally imposed because the district judge, in denying him "young adult offender" treatment pursuant to Title 18, United States Code, Section 4209, abused his discretion by allegedly placing undue emphasis on appellant's involvement in the crime to which he pleaded guilty and did not take into account factors which appellant considers favorable to himself.

The sentencing minutes simply do not support appellant's assertion that the district court only considered appellant's involvement in the cocaine transaction in denying him Youth Corrections Act treatment.[3] The minutes

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[2] Appellants' co-defendants all pled guilty also to Count Three of the indictment and were sentenced as follows: Maria Nunez (7 years, 8 years special parole); Luis Toro (Youth Corrections Act Treatment pursuant to Title 18, United States Code, Section 5010(b)); Enrique Lozano and Ramon Restrepo (time served and deportation). "Jane Doe" is a fugitive.

[3] Since appellant claimed to be 23 years old at the time of the plea, he could only have qualified as a "young adult offender" and not a "youthful offender" for purposes of the Youth Corrections Act. Title 18, United States Code, Sections 5006(e) and 4209. In this connection it should be noted that the presumption in favor of Youth Corrections Act treatment which is enjoyed by "youthful offenders," who are under 22, is not shared by "young adult offenders," who are between the ages of 22 and 26. See *United States* v. *Torun*, Docket No. 76-1055, slip op. 4161 (2d Cir., June 14, 1976). Significantly, the probation officer stated in his pre-sentence report that he believed appellant to be lying about many facets of his personal history, including his age.

reveal that, before imposing sentence, the judge had read a detailed probation report, the accuracy of which appellant has never disputed (Tr. Oct. 24, 1975, 7). The report contained detailed information as to the crime itself,[4] appellant's participation,[5] appellant's version of his participation,[6] and his prior record.[7] Also covered in the report was appellant's personal background, including information about his home and neighborhood, his religion, his interests and activities, his health—physical and mental, his past employment, his military service and his resources. The report concluded with an evaluative summary of appellant. Furthermore, contrary to appellant's assertion (Appellant's Br. p. 10), the judge, prior to imposing sentence, made specific reference to appellant's admissions of guilt and his desire to exculpate two of his co-defendants (Tr. Oct. 24, 1975, 8).[8] In view of the fact that the record shows that the court took into account all of these factors, we fail to understand how it

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[4] The report indicates appellant had access to an additional six and one-half pounds of cocaine on the date of his arrest.

[5] The report indicates that appellant and Maria Nunez were the most culpable of the defendants.

[6] The report also contains appellant's assertion of the innocence of co-defendants Lozano and Restrepo.

[7] Appellant received a three year sentence on June 18, 1973, for stabbing a woman, threatening to kill her on a subsequent date and then carrying through the threat by firing three shots at her. The report also indicates that appellant was an illegal alien, with an outstanding deportation order at the time of the plea.

[8] Appellant appears to be arguing not that the judge did not consider appellant's statement in which he sought to exculpate his co-defendants but that the judge was not overly impressed by this assertion. We fail to see why the judge should have been required to consider this statement as so "admirable" (Appellant's Br. p. 10). This is borne out by the fact that both so-called innocent victims-Lozano and Restrepo-pled guilty to superseding information on December 1, 1975.

can be claimed that Judge Costantino acted arbitrarily in deciding that the rehabilitative provisions of the Youth Corrections Act should not be invoked for a defendant who was to be deported as an illegal alien after his prison term. Indeed, it is not unreasonable to conclude that appellant's counsel did not request Youth Corrections Act treatment for his client because it would have been an audacious request on behalf of an illegal alien.[9]

Appellant's reliance on *United States* v. *Schwartz*, 500 F.2d 1350 (2d Cir. 1974), *Stead* v. *United States*, 531 F.2d 872 (8th Cir. 1976), *United States* v. *Dinapoli*, 519 F.2d 104 (6th Cir. 1975), and *United States* v. *Stein*, Doc. No. 76-1299, slip opin. 211 (2d Cir., October 22, 1976), in support of his claim that the court abused its discretion in sentencing him is wholly misplaced. Those cases involved situations where either the court adopted a fixed and mechanical approach in imposing sentence (*Schwartz*), failed to order a presentence report (*Dinapoli* and *Stead*), or relied on erroneous information (*Stein*). No such situation presents itself here.

Just 35 lines in the transcript prior to his denial of Youth Corrections Act treatment Judge Costantino indicated he had read and considered the probation report. As stated above, the probation report contained all of the information which Title 18, United States Code, Section

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[9] One of the key features of the Youth Corrections Act is that the Youth Correction Division is empowered to order conditional release under supervision, with federal probation officers providing the supervision. *Dorszynski* v. *United States*, 418 U.S. 424, 434-435 (1973); Title 18, United States Code, Sections 5007, 5017 and 5019. Imposing YCA treatment on an illegal alien who was to be deported upon completion of his jail time and who could not gain the benefits of the conditional release program would have been pointless.

4209 requires to be taken into account for a "young adult offender." Thus, there is no basis for concluding that Judge Costantino acted arbitrarily or without a proper exercise of his discretion. In short, appellant's attack here stems from an unhappiness with the length of his sentence, a factor which has never been considered a basis for review. *United States* v. *Seijo*, 537 F.2d 694, 700 (2d Cir. 1976). Appellant's claim is frivolous.

CONCLUSION

The district court's order of March 18, 1976, denying appellant Negron's Rule 35 motion to vacate, as illegally imposed, his ten year sentence for distribution of cocaine should be affirmed.

Respectfully submitted,

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Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 26th day of November, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

William J. Gallagher, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 U.S. Courthouse - Foley Square
New York, N.Y. 10007

Evelyn Cohen

Sworn to before me this
26th day of Nov. 1976

Martha Scharf

MARTHA SCHARF
Notary Public, State of New York
No. 24-1480350
Qualified in Kings County
Commission Expires March 30, 1977